

NAVIGATING THE DIGITAL SERVICES ACT: INNOVATION AND ACCOUNTABILITY

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In an era where digital platforms play an integral role in our daily lives, regulating the digital landscape has become an imperative matter. The European Union has taken a significant step in this direction with the Digital Services Act (DSA). This landmark legislation, aims to address a wide range of issues, from online content moderation to competition concerns, reshaping the way digital services operate within the EU. Its primary goal is to establish a safer and more accountable digital environment across the EU. Moreover, the DSA will amend the current e-Commerce Directive, which dates back to 2000.

The EU recognises the growing importance of digital platforms in our everyday lives and has responded by implementing the DSA. This comprehensive legislation tackles various aspects of the digital landscape, where internet service providers must implement mechanisms that prevent and remove content, from users, which involves illegal goods or services (any information, which in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law) i.e. copyright infringements. However, it is equally important for these measures to be in line with fundamental rights, ensuring a safer and more competitive digital environment. The DSA aims to strike a balance between these objectives, promoting compliance with fundamental rights while fostering a secure and competitive digital space.

The EU's (DSA) applies to "Very Large Online Platforms" and "Very Large Online Search Engines". These are the apps and search engines visited by more than 45 million Europeans, or 10 percent of the continent's population, every month, including Facebook, Instagram, X (formerly Twitter), Snapchat, YouTube, and LinkedIn. The legislation requires intermediaries to take more responsibility for the content hosted on their platforms. According to OECD, intermediaries are those that give access to, host, transmit and index content, products and services originated by third parties on the Internet or

Success will depend on effective enforcement, striking a balance between innovation and accountability.

provide Internet-based services to third parties. The DSA strives to create unified mechanisms for regulating online platforms, however Article 17 of the Directive on Copyright in the Digital Single Market (Copyright Directive 2001/29/EC), introduces a new liability framework for online service providers. Both the DSA and Article 17 of the Copyright Directive (2001/29/EC) impose obligations on online intermediaries that must adhere to when addressing illegal content. The Copyright Directive (2001/29/EC) will not be examined in this Article.

1. Introduction

The DSA Regulation, was approved by the Council of the European Union (EU) in September 2022 and published in the Official Journal on 27 October 2022. Its primary goal is to establish a safer and more accountable digital environment across the EU.

The DSA also aims to set higher standards of transparency, accountability and protection of fundamental rights. It also seeks to harmonise the responsibilities of intermediaries. Affected service providers will have until the 1st of January, 2024 to comply with the provisions of the DSA. The DSA is regulating terrorist content, child sexual abuse material and political advertising. The DSA is an EU Regulation and will apply directly to every Member State.

In this article, we delve into the key aspects of the DSA and its potential impact on intermediaries. According to OECD, intermediaries are those that give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties. DSA applies to “Very Large Online Platforms” (VLOPs) and “Very Large Online Search Engines” (VLOSEs). VLOPs and VLOSEs are those with more than 45 million users (10% of the population in Europe). Notable examples of intermediaries are YouTube, Facebook, Spotify, eBay, Amazon, and more. The legislation requires intermediaries to take more responsibility for the content hosted on their platforms.

While the DSA aims to establish harmonised mechanisms in the field of online platform regulation, several sector-specific regulations are already in place. In the area of copyright protected content, Article 17 of the Directive on Copyright in the Digital Single Market (Copyright Directive) establishes a new

liability regime for certain information service providers. Both the DSA and Article 17 of the Copyright Directive 2001/29/EC set forth a number of obligations on how the information service providers should deal with illegal content.

2. Intermediaries are still protected but are subject to significant new responsibilities

2.1 Liability of Online Platforms

As the Internet's scale and scope has expanded, so has the role of Internet intermediaries. These intermediaries provide the Internet's basic infrastructure and platforms, enabling communications and transactions between third parties and offering various applications and services. The e-Commerce Directive 2000/31/EC Articles 12-14, establishes limited liability exemptions, commonly known as “safe harbours”, under which certain intermediary service providers are exempt from liability of third-party content. The intermediaries eligible for liability exemption are those providing mere conduit, caching, and hosting services. Liability exemption applies only when a service falls under one of these specific activities.

In line with the e-Commerce Directive, the DSA preserves the hosting, caching, and mere conduit protections initially introduced in the e-Commerce Directive. This means that intermediary service providers will not be burdened with general monitoring obligations and the existing “notice and takedown” process will be retained. Under this process, a hosting provider becomes liable for illegal content only if it is aware of the illegality and fail to promptly remove or disable access to the content expeditiously.

Intermediary service providers will also benefit from a new “Good Samaritan” provision, ensuring that they do not lose their defences simply because they conduct self-initiated investigations to identify and remove illegal content (some examples of illegal content include child porn, hate speech, pirated music, movies, or software, counterfeit products, and more). Similarly, providers offering indexing, search functions, or recommendations based on user preferences will not automatically be considered as having knowledge of illegal activities or content on their platforms,

2.2 Providers of Intermediary Services

All intermediary service providers, including those offering mere conduit and caching services, must adhere to the following obligations:

1. Single Point of Contact: Reflecting the fact that some service providers can be difficult to be identified and contacted, DSA requires that in order to ensure ease of identification and communication of intermediaries they must provide a public “point of contact” in order to be contacted by authorities and users.

2. EU Representative with Direct Liability: If a service provider operates outside the EU but offers services within the EU, it must appoint an EU-based legal representative. This resembles the EU representative concept in the General Data Protection Regulation (GDPR). This requirement applies without exemptions, even to small companies. Additionally, under the DSA, this representative can be held **directly liable** for breaches, a role that carries significant responsibilities.

3. Terms and Conditions and Disclosure Requirements: Service providers must outline any restrictions on the service, content moderation measures and algorithmic

4. Annual Transparency Reports: Intermediaries must issue yearly transparency reports, on matters such as content moderation measures and the number of takedown and disclosure orders received.

5. Acknowledgment of Takedown and Information Disclosure Orders: When service providers receive takedown or information disclosure orders from EU judicial or administrative authorities, they must notify the authority of any of the actions taken. There is not however, an actual obligation to comply with these orders and their legality and scope must be assessed separately based on relevant EU or national laws. If content is removed or information disclosed, the user must be notified.

“These requirements, are aiming to enhance transparency and accountability, may however pose practical challenges for intermediary service providers, particularly in terms of legal representation within the EU and compliance with various reporting obligations.”

3. Significant Changes of the Digital Services Act in a Nutshell

3.1 Online Content Moderation: One of the most crucial aspects of the DSA is its focus on content moderation. It introduces obligations for digital platforms to address illegal content swiftly and effectively, including hate speech, terrorist content, and counterfeit products.

3.2 Transparency and Accountability: The DSA emphasises transparency, requiring platforms to provide clear terms and conditions and transparent advertising practices. If users can purchase products or services through the app, then it is the platform’s responsibility to ensure they are legitimate. They should also perform random checks for their legality.

3.3 Safeguarding Users: The DSA introduces safeguards for users' fundamental rights, ensuring freedom of expression while combating harmful content. Users will have the right to challenge content removal decisions.

3.4 Child protection – Platforms must take measures to protect the privacy and security of children and cannot show them adverts based on their personal data.

3.5 Enforcement: Breach of the DSA comes with the customary turnover-based fines. Intermediaries can be fined up to **6%** of annual worldwide turnover and users have a right to compensation for any damage or loss suffered as a result of a breach.

The enforcement mechanism is not only limited to fines. The DSA also allows for enforcement both by national regulators, known as Digital Service Coordinators and directly by the Commission. They will have the power to require immediate actions where necessary to address very serious harms, and platforms may offer commitments on how they will remedy them.

If the Commission definitely establishes a breach of the DSA, it may adopt a decision imposing fines up to 6% of the global turnover of the VLOP or VLOSE concerned and order that provider to take measures to address the breach by the deadline set by the Commission.

Closing remarks

The Digital Services Act represents a significant leap forward in regulating the digital landscape within the European Union. It aims to create a safer, more transparent, and competitive online environment while

addressing the challenges posed by digital platforms. However, its success will depend on effective enforcement, striking a balance between innovation and accountability and addressing the practical implications for businesses and users alike. As the DSA progresses through legislative channels, its impact on the digital world will be closely watched, not only within the EU but globally, as it may shape future digital regulations worldwide.

The purpose of this Article is to provide a general guideline on the subject and not to be considered, in any way, as legal advice. It is advisable to seek professional and legal advice on the subject before proceeding with any general information provided to you. For further clarifications and advice please contact us at legal@economideslegal.com

Xenia Kasapi, LL.B., LL.M., MCI Arb
Senior Advocate
Head of the Intellectual Property
& Data Protection
xenia.kasapi@economideslegal.com